eight years later by the SIXTH Circuit: *Gariepy* v. *United States*, 189 F.(2d) 459, 462 (CA-6; 1951).

B. The erroneous instructions below as to willfulness and intent were directly in conflict with prohibition of similar instructions from the THIRD, NINTH and even from the FIFTH Circuit, itself. *United States* v. *Allegrucci*, 258 F.(2d) 70 (CA-3; 1958—Op. 1); *Legatos* v. *United States*, 222 F.(2d) 678, 687 (CA-9; 1955); *Bloch* v. *United States*, 221 F.(2d) 786 (CA-9; 1955—Op. 3, 4, 5) reh. den. 223 F.(2d) 297. See, also: *Morris* v. *United States*, 156 F.(2d) 525 (CA-9; 1946—Op. 11); *cf.*:—*Wardlaw* v. *United States*, 203 F.(2d) 884 (CA-5; 1953—Op. 6); *Gomilla* v. *United States*, 146 F.(2d) 372 (CA-5; 1944).

C. The decision below erroneously, with respect, declined to extend petitioners the benefits of *Rule 52(b) FRCrimP*; this was in conflict with its own decisions in the FIFTH Circuit. *Gomilla* v. *United States*, *supra* [(See: *Powell* v. *United States*, 297 F.(2d) 318 (CA-5; 1961 (December)); *Huffman* v. *United States*, 297 F.(2d) 754 (CA-5; 1962 (Jan.))].

REASONS FOR GRANTING THE WRIT

I. Importance to criminal jurisprudence

A. Documents from the Social Security case of Martinus Bartee were introduced during the first few minutes of the trial, over continuing and repeated objection. (Exhibits, Government Nos. 8, 9, 10—R. 39-41) Bartee was said by the prosecutor to be dead at trial time. Similarly, documents from the case of Mary Bevly were introduced. (Exhibits, Government Nos. 11, 12, 13—R. 50-51) Mary Bevly also was dead at trial time.

Both those persons were named in the indictment as co-conspirators but not indicted.

Further, and over similar objection, documents from the Social Security case files of Will Hardaway, and Charlie

Heidelberg, Sr., were introduced and, under pressure, the prosecutor admitted they were prepared by a local accountant by name of Joe Sadka. (Exhibits, Government 23, 24, 25—R. 64-68)

Additionally, and over similar objection, documents from the same case files were introduced respecting Ed Conley and Arthur Cole. (Exhibits, Government Nos. 18, 19) They were named in the indictment as co-conspirators, but not indicted.

Nothing further appears in the record as to any of those documents, except that the Social Security Zone Manager (Smith) testified they did not allow the claims to Social Security benefits, although they allowed small amounts to two of them for short whiles. The manager then went on, over objection, to testify how much a total claim would have been over the life of the recipient had it been allowed instead of rejected. (R. 76-80) Nothing further appears in the record as to those cases.

The Court instructed the jury that action by the Social Security Administration in refusing to allow or in terminating a claim could be considered as evidence against petitioners. (R. 479-503) Petitioners thus state with confidence that the documents themselves are the only evidence in the record. And they went into the jury room, along with the indictment. The trial judge charged the jury emphatically—petitioners thought—defendants were charged with the items specifically set forth in the indictment (R. 500) and four of those returns were specifically set forth in the indictment. (Bartee, Bevly, Conley, Cole) Two of them were never mentioned in the indictment (Will Hardaway, Charlie Heidelberg, Sr.) or anywhere else in the record except in the testimony of Manager Smith. Showing clearly that they were not connected with petitioners, they, nevertheless, went into the jury room, along with the others.

When petitioners moved for new trial, no evidence having been adduced on the returns of persons named in the indictment, or otherwise on the others, they should have been stricken because, at that point, the error of sending them in without evidence was merged with the initial motion before trial to purge the indictment, itself. (R. 4, 11) And the motion to purge the indictment was brought forward by the motion for new trial. Both, however, were rejected.

While the judge charged the jury in copy-book language that the indictment was not evidence, but a list of things the Government said it could prove, he made the indictment into evidence despite that charge, by sending evidence drawn only from indictment names. Bartee, Bevly, Conley and Cole being named in the indictment, and their returns not identified except by the indictment as part of the alleged conspiracy, merged with the indictment, itself, or it with them. Either way, no reasonable mind would say that the charge did not become the proof in these circumstances.

When the otherwise unqualified returns of dead alleged co-conspirators went into the jury room, the accusing finger of the government went along with them. The returns should not have been admitted.

It was complete disregard of the protection for rights of an accused, repeatedly vouchsafed by the decisions of this Court, and the record was never made to show affirmatively that such error was cured or prejudice removed. This was reversible error. *Bollenbach* v. *United States*, *supra*; *Speiser* v. *Randall*, *supra*.

B. The instructions from the trial judge that the claim of Maggie Cotton was one to which she was not entitled as a matter of law, is not the law, and it was erroneously stated to the jury as being the law, with deference. The Court went further, although more words were not neces-

sary to direct a verdict of guilt at this point, and advised the jury his opinion was that her returns were willfully and intentionally excessively stated over supporting facts. (R. 484)

When considering objections to that declaration, the Court enlarged upon it and emphasized it, pointing out to the jury that he had the duty to comment in that manner. (R. 506) The fact that he then used a few words to tell the jury it might determine the facts as to fraud and falsity, and the weight and credibility of testimony (R. 485, 506-7) could not erase from the minds of any juryman the strong declaration "as a matter of law" which the judge did not modify. Actually, he took weight and credibility away from them, too. Maggie Cotton testified just the opposite. Since the judge had told them to take the law from him, they could not do much with that which he told them they might decide. Even if they could, it is very unlikely they would pit their lay minds against his legal position as to what the law might be.

Maggie Cotton testified she wrote down her figures and they were correct. She believed her claim was just, and always had believed that. (R. 122-66)

As a matter of fact, the claim of Maggie Cotton was one to which she was entitled on its face. *42 USC 410, 411.* There it is provided that income from farming, if less than $1800 total, shall be deemed to be ⅔ of that amount, or up to $1199.99 at the option of the claimant. The judge did not tell the jury this, either on objection to his charge as given or elsewhere. Petitioners were entitled to that side of the law, and the return of Maggie Cotton could not then have gone to the jury.

Neither did the judge instruct the jury that it was a duty of the prosecution to show that she was not entitled to that option.

The return of Maggie Cotton was the main stone in the prosecution structure. Without it, the verdict of guilty

probably never could have been reached; with it, and the charge as given, there was no escape from that verdict. And the Maggie Cotton return took the others with it.

This charge was reversibly erroneous, being unfairly erroneous and too gravely prejudicial to survive. *Quervia* v. *United States, supra; Krulewitch* v. *United States, supra; Katteakos* v. *United States, supra.*

C. Guilt; reasonable doubt; farm income

Guilt

The charge to the jury extended over 138 lines of the transcript as to conspiracy and guilt of conspiracy; that respecting innocence or good faith extended over only seven lines. (R. 482-4, on conviction or conspiracy, 68 lines; on coincidence, 1 line; R. 484-6, on guilt of conspiracy, 36 lines; on innocence, 6 lines; R. 487, on guilt, 24 lines; on innocence, none; R. 493, on guilt or conspiracy, 10 lines; on innocence or good faith, none)

This not only was one-sided but reducing defendants to no more than the form of a forum of fairness. It has repeatedly been rejected by the judiciary as a practice, and reversed because of such practice. It is no different, here, with respect, more especially since defendants below objected and asked for equal time on innocence, which was summarily rejected. (R. 504-12)

Reasonable Doubt

The words "reasonable doubt" are generally thought to be sufficient in themselves, if left alone. But once a judge undertakes to explain them in a charge to the jury, petitioners believe he assumes the obligation to explain them completely, and not in favor of prosecution, as was done here. The given instruction (R. 494) is not the accepted law as to reasonable doubt in a criminal cause, although it frequently is encountered as acceptable law in civil cases.

That given bears too heavily on motivation, and not at all on decision making by the jury.

The actual charge given (paraphrased here) was that "proof beyond a reasonable doubt" is made when the jury would be willing to rely on the adduced quantum or quality of evidence in their most important affairs. (R. 487, 493, 494) That is wording to defend a prosecutor, with deference, and takes away from a defendant such help as he should have from instructions, namely, fair balance of two sides. The other side, here, for example, ought to be that which flows from proof short of reasonable doubt, but the judge was silent on that. Still a part of the other side is the important doctrine whenever proof necessary for conviction is entirely consistent with innocence, acquittal must follow. This so well established as a doctrine of "hypothesis of guilt" that it is deemed unnecessary to lengthen this petition with citations. The trial judge was silent on that, too, however, so that which he did say concluded by being for the prosecution only.

This Court has declared that such is reversible error, whether or not accepted by defendants on trial.

Farm Income

Farm income was charged by the trial judge as that from activities in which the claimant was materially active (R. 509-511) and he refused to amend it when objection was lodged. Actually, that is not the law, and nowhere in Social Security jurisprudence is there such a limitation.

The definition of farm labor (for an employee) is found in *42 USC 410(f)* providing (in substance) that it is labor connected with producing or tending agriculture in any form, with some limitation on canning and packaging. The statutory limitation is that, if the employment is more than a half-year, it is deemed to be a year. The definition for self-employment farm income is that found in *42 USC 411(a)(7)(B)(i)* providing that, if it would be farm in-

come if done exclusively by employees (by reference to *42 USC 410(f)* and would be farm income on that reference) it is farm income for self-employed. None of that was given by the Court, even on request. And that given, with respect, is not the law; nor, in fact, is there any law to support that given.

Summary

The multiple errors, and necessarily ensuing prejudice in this case, from these instructions so confused the rules by which the jury was to deliberate that it is astonishing they were able to bring in a verdict at all. In any event, such error as this, objected to or not, has been consistently referred back for new trial by this Court, and it is no different here. *Binn* v. *United States, supra; United States* v. *Murdock, supra.*

D. The "intent of the natural and probable consequences" charge was given the jury by the trial judge despite the fact that intent is an essentially critical element of the charge being tried, namely, to defraud. That, and conspiracy, cannot occur without intent.

When the charge was thus given, it withdrew from the jury the very fact they were convened to determine. They could not avoid a verdict of guilty on this charge alone, even though they might have had confusion from others.

Invading the province of the jury, and taking away from them the very determination they must make for conviction or acquittal is taking away the jury from defendants. That is not the contemplation of the American scheme of corrective justice, petitioners believe.

This Court has declared that trial judges must not do that and that, if they do, they must be reversed, whether or not objection was saved and noted at trial time. *Morissette* v. *United States, supra.*

II. Conflicts with other circuits

A. The trial judge chose inferences for the jury

When the trial judge charged that, as a matter of law, the alleged co-conspirator, Maggie Cotton, was not entitled to her claim, he threw out her testimony. He has the right and, even, the duty to comment on his opinion of her credibility, but he has no authority to withdraw from the jury their consideration of that credibility. That was effectively accomplished here.

Being under the persuasive and awesome opinion of the judge that a critical return is false, it follows naturally that the jury then and there merges in its minds the indictment, the criminal statute and the evidence. Such can only mean a verdict of guilty. It has been explained previously herein (Section I. B.) that the invitation from the Court to the jury that it decide the questions of willfulness and intent. The choosing of the inference for them shows how empty were the words of that invitation.

Other circuits have declared the law to be that these things may not be done by the trial judge. When the Fifth Circuit affirmed below, it did so in direct conflict with the decisions on the law from those other circuits. *United States* v. *Valenti, supra; Gariepy* v. *United States, supra.*

B. Conflict on willfulness and intent

There has been discussed foregoing (Section I. D.) the manner in which the instruction as to willfulness, or intent was erroneous in law. When that was given to the jury on trial, it was in conflict with the decision of every Circuit that has had occasion to consider the matter. Like perjury, somewhat, willfulness and intent in a criminal matter such as this have as an essential ingredient guilty knowledge at time of the act. The instruction was not alone one-sided, as previously noted, but was legally insufficient here in that the complete definition was not given

to include proof of knowledge that the facts were such as would come into conflict with the law. It was not necessary that the actor be charged with knowing the law, itself, although the instruction was given that ignorance of the law is not excuse.

The charge as given preempted the presumption of innocence, and it was not cured when the judge told the jury the presumption went along for the duration of the trial. That, with deference, was too innocuous in the circumstances.

The danger in the instruction as given, and the manner in which it tends to establish a presumption of guilt, is in this way:—

(1) The petitioner Heidelberg prepared some of the returns;

(2) The indictment charged them as false and fraudulent;

(3) The Court charged that one of them (Maggie Cotton) was a return not entitling her to her claim, as law;

(4) The Court admitted into evidence, over proper objection, returns of deceased alleged co-conspirators and sent them to the jury with the indictment;

(5) The returns being thus tainted, became false and fraudulent by implication (and presumption) from their mere presence each with the other and all with the indictment.

That, clearly, cast back upon petitioners the task of proving their innocence, which is not the law. It gave the prosecutor, instead of the task to prove guilt, a presumption of guilt. That, with respect, is not the law, either.

The prejudice speaks from the acts; the record does not disclose any affirmative evidence of clearing it of such prejudice. The prejudice so created went into direct con-

flict with all the circuits speaking on the subject. *Bloch* v. *United States, supra; Morris* v. *United States, supra; Wardlaw* v. *United States, supra; United States* v. *Allegrucci, supra* (distinguished on the type of crime, but apposite on the matter of guilty intent and knowledge); *Legatos* v. *United States, supra; Gomilla* v. *United States, supra.* (Petitioners note that the decision of the FIFTH Circuit in *Gomilla* also conflicts with that in this case.)

C. Withheld benefit of Rule 52(b) FRCrimP

The obvious total ground in the *per curiam* decision affirming below was that of sufficient substantial evidence. The FIFTH Circuit has said (*Gomilla, supra*) that it will accord the benefit of that rule in plain error cases, but did not do so here. While the FIFTH Circuit so stated, it is not always clearly predictable the exact course decisions will take in that Circuit, with respect. That distinguished Court recently had occasion to illustrate this dilemma of the bar before it.

(1) The FIFTH Circuit, in *Powell* v. *United States, supra,* commented that exceptions had been noted and saved on trial against the so-called "Allen Charge", sometimes called the "dynamite" charge from its effectiveness in achieving a verdict when juries are in disagreement. *Allen* v. *United States* (1896), 17 S. Ct. 154 (164 U.S. 492, 501; 41 L. ed. 528). *Powell* involved a supplemental charge on such disagreement, in the Northern District of Mississippi. (Judges Tuttle, Cameron, Brown)

(2) Less than 30 days later, in: *Huffman* v. *United States, supra,* from the Northern District of Mississippi, where a much stronger, a more forceful supplemental charge was given a jury in disagreement (the last case at the term) but exceptions were not noted and saved on trial, the FIFTH Circuit rejected the qualifications of the case for benefits of Rule 52(b) (Judges Rives, Cameron,

Brown; but see, with deference, the vigorous dissent of Judge Brown). The dissent may tend to dilute the effectiveness of rejecting qualifications for Rule 52(b) in that as precedent for so doing.

Petitioners acknowledge that the FIFTH Circuit in its *per curiam* decision (not often encountered in felony cases) said it had reviewed the entire record. That distinguished Court, with deference, is famous for doing just that, often to the discomfort of the bar on oral argument. Here, having done so, petitioners dare to suggest that the distinguished Court recalled its decision in *Huffman*, but misrecollected that in *Gomilla*, *supra*. The errors here not noted, though many were, appeared too plainly and too prejudicial to be disregarded, with respect. The substantial rights of petitioners in a criminal proceeding, seeking their loss of liberty, were set aside by withholding the benefits of Rule 52(b).

III. Other reasons for granting writ

A. Reference to color of petitioners

When the trial judge referred to the petitioners as "those colored people" and the prosecution spoke of their going among the "aged colored" people of their community, they no doubt intended it with kindness and protective intent. It is not within the capacity of petitioners to assay the prejudice which resulted from that reference. They do say that it is the only case known to them on research where such occurred. They note, also, that there is no record of any criminal trial in that Court opening with judicial reference to "those white people" or "those Indians" or "those yellow people".

Any prejudice ensuing could be assayed only after completion of the trial. It was prejudice, whether or not saved by exception or objection. The record does not show any effort to clear the prejudice, and petitioners say flatly there

necessarily was such. There is no law connecting crime with "color" in the United States.

A better trial was the right of "those colored people", since this approached the likelihood of trying class instead of crime.

B. Economic punishment

Petitioner Hardaway lost his employment as a school teacher directly resulting from this conviction. If fairly convicted, he should lose it and never be re-employed.

The crime of conspiracy is among the very most reprehensible of crimes against society. This arises somewhat from the fact that, due to its thief-in-the-night noiselessness of foot steps, its presence is never known until the result appears. Somewhat like kidnapping, it chooses its victim in person, and by design.

Because of its ugly character, this crime requires fully as much care in safeguarding defendants against conviction on erroneous procedure as does the efforts of government to prevent its occurrence. All applaud both those doctrines.

If petitioner Hardaway were unfairly convicted, he is entitled to freedom and opportunity to re-identify himself with his life vocation. The notice of dismissal from employment, and its reasons, are hereunto copied as *Exhibit "D"* in the appendix.

CONCLUSION

Petitioners are familiar with the judicial doctrine that *prima facie* greater justification is always present for sustaining courts below than for reversing them. They say, though, that their case is sufficient unto the obvious unfairness here to overcome that presumptive rule.

Commencing with the gratuitous reference to "those colored people" by Court and prosecutor; proceeding to

alleged fraudulent returns of dead people and merger with the indictment; identifying the critical return (Maggie Cotton) as false as a matter of law and, therefore, associable with those made so by the indictment language; declining complete instructions on critical questions and giving erroneous instructions on equally critical matters; all those things held petitioners away from the course of a completely fair trial.

Clearly, this record will not rightfully withstand timely motion for new trial. Where instructions are obviously wrong, and lead to a prejudged conclusion, they prevent even the form of a fair trial when viewed in complete detachment and objectivity.

All petitioners seek here is a new trial in an atmosphere of fairness. This Court, with respect, has said and repeated, in an unbroken line of decisions as old as jurisprudence itself in this country, that nothing less will serve.

A new trial should be a recognized right for "those colored people".

Respectfully submitted,

J. J. (JAKE) HARDAWAY,
Petitioner

KATIE MAE HEIDELBERG,
Petitioner

Pro se (pending engagement of Washington counsel)

DEQUINCY V. SUTTON,
214 Dixie Towers,
Meridian, Mississippi.
Of Counsel

APPENDIX

EXHIBIT A

J. J. (JAKE) HARDAWAY AND KATIE MAE HEIDELBERG,
Appellants,

v.

UNITED STATES OF AMERICA, *Appellee.*

No. 19378

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

Aug. 8, 1963

Prosecutions for conspiracy to defraud United States. The United States District Court for the Southern District of Mississippi; William Harold Cox, Chief Judge, entered judgments of conviction and the defendants appealed. The Court of Appeals held that the evidence sustained convictions for conspiracy to defraud United States by assisting other persons to file false claims to obtain social security benefits.

Affirmed.

Conspiracy (West Key Number System) 47

Evidence sustained convictions for conspiracy to defraud United States by assisting others to file false claims for social security benefits. 18 U.S.C.A. § 286.

.....

Before PHILLIPS,* CAMERON AND WISDOM, Circuit Judges.

PER CURIAM.

The appellants, a brother and sister, were indicted for conspiring with each other and with other named persons to defraud the United States by assisting the other named persons (who were not indicted) to file false claims to obtain social security benefits, in violation of 18 U.S.C. § 286.

* Of the Tenth Circuit Sitting by designation.

The jury returned a verdict of guilty against each. The Court sentenced each to imprisonment for three years and to pay a fine of $1,750, but suspended the sentence of imprisonment in each case on condition that the fine be paid on or before January 1, 1962. The appellants were admitted to bail pending this appeal.

After a careful review of the record and briefs, we hold that the evidence was sufficient to support the verdict. We find no reversible error in any of the trial judge's rulings. The appellants received a fair trial.

The judgment is affirmed.

EXHIBIT B

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

OFFICE OF THE CLERK

December 9, 1963

POST OFFICE BOX 30120
NEW ORLEANS 30, LA.
EDWARD W. WADSWORTH, CLERK

Re: No. 19378—J. J. (JAKE) HARDAWAY AND KATIE MAE HEIDELBERG, v. UNITED STATES OF AMERICA

Gentlemen:

You are hereby advised that the Court has today entered an order denying the Petition for Rehearing in the above case. No opinion was rendered in connection therewith.

Very truly yours,

EDWARD W. WADSWORTH
Edward W. Wadsworth, *Clerk*

MR. DEQUINCY V. SUTTON
Attorney at Law
Meridian, Mississippi

MR. ROBERT E. HAUBERG
U. S. Attorney
Jackson, Mississippi

MR. JACK MCDILL
Assisant U. S. Attorney
Jackson, Mississippi

EXHIBIT C

UNITED STATES COURT OF APPEALS
FOT THE FIFTH CIRCUIT

No. 19378

J. J. (JAKE) HARDAWAY AND KATIE MAE HEIDELBERG,
Appellants,

v.

UNITED STATES OF AMERICA, *Appellee.*

ON CONSIDERATION OF THE APPLICATION of the appellant in the above numbered and entitled cause for a stay of the mandate of this Court therein, to enable appellant to apply for and to obtain a writ of certiorari from the Supreme Court of the United States, IT IS ORDERED that the issue of the mandate of this Court in said cause be and the same is stayed for a period of thirty days from December 9, 1963; the stay to continue in force until the final disposition of the case by the Supreme Court, provided that within thirty days from December 9, 1963 there shall be filed with the Clerk of this Court the certificate of the Clerk of the Supreme Court that certiorari petition and record have been filed. It is further ordered that the Clerk shall issue the mandate upon the filing of a copy of an order of the Supreme Court denying the writ, or upon the expiration of thirty days from December 9, 1963, unless the above-mentioned certificate shall be filed with the Clerk of this Court within that time.

/s/ JOHN MINOR WISDOM
United States Circuit Judge.

Dated: (Original Filed—December 17, 1963)

EXHIBIT D

BEN M. CALDWELL, ATTORNEY AT LAW
TELEPHONE 326-4421
MARKS, MISSISSIPPI

October 10, 1963

J. J. Hardaway
Route 1, Box 188
Enterprise, Mississippi

J. J. Hardaway:

The Board of Education of Quitman County, Mississippi requested me to advise you that they have terminated and rescinded your contract of employment for teaching school for the Quitman County School District for the school year 1963-64. I believe that you are aware of the reasons for the termination of your contract at this time, but in event that you are not I shall state the same briefly here.

You were convicted by the Federal District Court of conspiring to defraud the Social Security Administration of the United States of America, and the conviction was then affirmed by the Circuit Court of Appeals. Had the School Board known that you had been convicted in the District Court they would not have approved any contract for teaching school in this county, and now that the same has been brought to their attention they believe it is best for the pupils of the Quitman County Industrial Elementary School, the teachers of the county and the Board of Education that your contract be terminated at once.

You will, therefore, take notice that as of October 8, 1963 your contract of employment, which was executed by you on April 12, 1963, has been terminated and rescinded as of that date.

Yours very truly,

/s/ BEN M. CALDWELL.
Ben M. Caldwell

BMC/tje